

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LESLIE JUMP

Claimant

VS.

THE BOEING COMPANY - WICHITA

Respondent

AND

AETNA CASUALTY & SURETY

Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 154,492

ORDER

ON the 28th day of December, 1993, the application of the respondent for review by the Workers Compensation Appeals Board of an Award entered by Assistant Director William F. Morrissey on November 24, 1993, and a Nunc Pro Tunc Order entered by Assistant Director William F. Morrissey on December 6, 1993, came on for oral argument by telephone conference.

APPEARANCES

The claimant appeared by and through her attorney, Steven R. Wilson, of Wichita, Kansas. The respondent and insurance carrier, appeared by and through their attorney, Frederick L. Haag, of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, James R. Roth, of Wichita, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the Award of the Assistant Director is herein adopted by the Appeals Board.

STIPULATIONS

- (1) While the issue of compensability was listed in the submittal letter of respondent and insurance carrier, at oral argument, the attorney for the respondent advised that compensability was no longer an issue. As such the Appeals Board finds that claimant met with an accidental injury arising out of and in the course of her employment on March 18, 1991.
- (2) Notice of this accidental injury was properly given.
- (3) The parties have stipulated to an average weekly wage of \$606.44 for an injury date of June 10, 1990 and \$658.53 for an injury date of March 18, 1991.
- (4) Written claim was timely made.
- (5) The relationship of employee and employer existed on the alleged dates of accident.
- (6) The respondent and the Kansas Workers Compensation Fund stipulate that the Workers Compensation Fund shall reimburse to respondent seventy-five percent (75%) of any award together with a like apportionment of all costs and expenses associated with the litigation of this case.
- (7) Claimant has been paid 16.29 weeks of temporary total disability at the rate of \$271.00 per week for a total of \$4,414.56.
- (8) Medical in the amount of \$9,557.57 has been paid by the respondent and insurance carrier in this case.
- (9) Respondent has paid \$205.00 in unauthorized medical to Orthopedic Specialists and \$93.00 to Joachim Schnelle, M.D., in this matter.

ISSUES

- (1) What is the nature and extent of claimant's disability?
- (2) Is claimant entitled to additional temporary total compensation?
- (3) Is claimant entitled to additional medical benefits?

- (4) Is claimant entitled to additional vocational rehabilitation services?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition to the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

The Workers Compensation Appeals Board on review of any act, finding, award, decision, ruling or modification of findings or awards of the Administrative Law Judge shall have the authority to grant or refuse compensation, or to increase or to diminish the award of compensation or to remand any matter to the Administrative Law Judge for further proceedings. K.S.A. 44-551(b)(1).

- (1) The Appeals Board is persuaded, after reviewing the entire record, that claimant has proven by preponderance of the credible evidence that she is entitled to a 62.5 percent (62.5%) permanent partial general work disability as a result of an injury sustained on March 18, 1991, arising out of and in the course of her employment.

Claimant, an assembly line worker for Boeing, began her employment on June 6, 1989. She worked in a series of upper extremity use intensive jobs requiring repetitive motion of the hands, arms, and shoulders. Claimant first began experiencing problems in her left hand and wrist area. She originally sought unauthorized care with Dr. Schnelle, who prescribed anti-inflammatories and likewise returned her to work. The employer, after being informed of this unauthorized treatment, referred claimant to Dr. Daniels who continued the claimant on anti-inflammatory medication and returned her to work. The problems continued to worsen and subsequently spread to include her right upper extremity.

Claimant's ongoing treatment included carpal tunnel surgery on the right, cortisone shots bilaterally at the wrists, conservative treatment of her rotator cuff on the right upper extremity, and ongoing conservative care by several doctors, both authorized and unauthorized, including specific work restrictions.

Claimant was examined and treated by Dr. Tyrone Artz, who rated claimant at four percent (4%) permanent partial impairment to the body as a whole on a functional basis. Dr. Artz restricted claimant to sedentary work limiting her lifting to seven pounds lift one-third of each day and four pounds lift two-thirds of each day with a maximum lift of eight pounds while using both hands.

Claimant was examined by Dr. Ernest Schlachter at the request of the attorney for the claimant. Dr. Schlachter opined claimant had suffered a nineteen percent (19%) permanent partial impairment to the body as a whole on a functional basis. Claimant was restricted by Dr. Schlachter from repetitive pushing, pulling, twisting, grasping, no lifting in excess of ten pounds bilaterally, no overhead work, no work in a cold environment and no work with vibratory tools.

Subsequent to the treatment by the ongoing authorized doctors, claimant was returned to work for the respondent at a comparable wage in the work pool. This work, which was within the restrictions placed upon the claimant by the various doctors, was described by claimant as being a temporary accommodation by the employer. This accommodation lasted until claimant was laid off as a result of an economic slow down and

general labor reduction. Subsequent to this lay off, claimant was placed in a vocational rehabilitation program. The vocational rehabilitation plan recommended retraining as a medical technician. The plan would not return claimant to a comparable wage immediately but had the potential to return claimant to a comparable wage after a period of one to two years. The plan did exceed the 36 weeks limitation of K.S.A. 44-510g(e)(3) with no finding by the Director that this was an extremely unusual case. No special order was issued by the Director.

An evaluation was done on claimant by Jerry D. Hardin regarding claimant's loss of access to the open labor market and loss of ability to earn a comparable wage. Mr. Hardin opined claimant had suffered a seventy-five percent (75%) loss of ability to perform work in the open labor market.

Mr. Hardin, in evaluating claimant's loss of ability to earn a comparable wage used wage information which was not supported by the record. The average weekly wage of \$845.90 used by Mr. Hardin was not justified and clearly contradicts the stipulated wage of \$658.53. Mr. Hardin's opinion that claimant could earn \$6.00 per hour on a 40-hour week equaling an average weekly wage potential of \$240.00 is further not supported by the record. On cross-examination Mr. Hardin agreed claimant's potential salary earnings would be \$329.00 per week. From the stipulated average weekly wage of \$658.53 and a potential earning wage of \$329.00 per week, the Appeals Board finds that the claimant suffered a fifty percent (50%) loss of ability to earn a comparable wage.

K.S.A. 1992 Supp. 44-510e(a) states in part:

"There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

It is clear from the evidence in the record that the employee's return to Boeing for a period of time in the work pool was a temporary accommodation only.

While the respondent and Kansas Workers Compensation Fund encourage the Appeals Board to deny this claimant work disability, a preponderance of the credible evidence would indicate that claimant has indeed suffered a loss of ability to perform work in the open labor market and a loss of ability to earn a comparable wage as a result of the injury suffered up to and including March 18, 1991. The presumption of K.S.A. 44-510e(a) is overcome by the evidence presented herein.

The opinion of Mr. Hardin, while somewhat contradicted with regard to the ability to earn a comparable wage is not to be disregarded as it has not been shown to be untrustworthy once the appropriate average weekly wage is included in the computations. As such, the evaluation and opinion of Mr. Hardin is considered neither improbable nor unreasonable and will be considered by the Appeals Board. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

It is the finding of the Appeals Board that claimant suffered personal injury by accident arising out of and in the course of her employment by a series of accidents from June 10, 1990 through March 18, 1991. The series of accidents resulted in claimant having suffered a seventy-five percent (75%) loss of ability to perform work in the open labor market and a fifty percent (50%) loss of ability to earn a comparable wage.

In determining the extent of permanent partial disability, both a reduction of the

claimant's ability to perform work in the open labor market and the ability to earn comparable wages must be considered. Hughes v. Inland Container Corp., 247 Kan. 407, 414, 799 P.2d 1011 (1990).

In arriving at a percentage, a mathematical equation or formula must necessarily be utilized. The district court determined to give each element equal weight and average the two to arrive at a percentage. Hughes, Id. at 422; Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 51, 816 P.2d 409, rev. denied 250 Kan. 806 (1991).

This statute requires a balance of the claimant's ability to perform work in the open labor market and the claimant's ability to earn comparable wages. These factors must be considered in light of the employee's education, training, experience and capacity for rehabilitation. K.S.A. 1990 Supp. 44-510e(a).

The Appeals Board finds that, in applying the rationale and formula approved in Hughes, and by combining the seventy-five percent (75%) loss of access to the open labor market and fifty percent (50%) loss of ability to earn comparable wages, the claimant has suffered a 62.5 percent permanent partial general disability.

(2) The Appeals Board finds claimant is not entitled to additional vocational rehabilitation services as there was no hearing or presentation of evidence regarding whether extremely unusual circumstances existed in this matter justifying the extension of the vocational rehabilitation plan beyond 36 weeks. Without such a finding, a 60 week plan is prohibited under K.S.A. 44-510g(e)(3). The Order of January 14, 1993, by Administrative Law Judge John D. Clark, denying additional vocational rehabilitation is appropriate and remains in full force and effect.

The Appeals Board further finds that the Award of Assistant Director Morrissey dated November 24, 1993, did err in granting temporary total benefits at the rate of \$271.00 per week as the stipulated average weekly wage for the injury of March 18, 1991, would require a temporary total rate of \$278.00 per week. The Appeals Board adopts the December 6, 1993 Order of Assistant Director Morrissey modifying his original order and finds that claimant is entitled to 16.29 weeks of temporary total disability at the rate of \$278.00 per week for a total sum of \$4,528.62, followed thereafter by 398.71 weeks of permanent partial disability at the rate of \$274.41 per week for a 62.5 percent permanent partial general body work disability, with the total payment not to exceed \$100,000.00.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the claimant, Leslie M. Jump, is awarded compensation against the respondent, Boeing Military Airplanes, Aetna Casualty & Surety Company, and the Kansas Workers Compensation Fund, for 16.29 weeks of temporary total disability compensation at the rate of \$278.00 per week in the sum of \$4,528.62 followed by 398.71 weeks of permanent partial disability compensation at the rate of \$274.41 per week, the total sum not exceed \$100,000.00, for a 62.5 percent permanent partial general bodily disability. As of February 1, 1994, there would be due and owing to the claimant 16.29 weeks of temporary total disability compensation at the rate of \$278.00 per week in the sum of \$4,528.62 followed by 129.71 weeks of permanent partial disability at the rate of \$274.41 per week totalling \$35,593.72 which are ordered paid in one lump sum less any amounts previously paid, followed by 269 weeks of permanent partial disability at the rate of \$274.41 per week with the total sum not to exceed \$100,000.00, to be paid until such sum is reached or until further order of the Director.

All compensation, medical expense and costs herein are to be paid 75 percent by the Kansas Workers Compensation Fund and 25 percent by the respondent.

Costs are hereby assessed 75 percent to the Kansas Workers Compensation Fund and 25 percent to the respondent to be paid as follows:

BARBER & ASSOCIATES	
Continuation Transcript of Regular Hearing	\$ 125.00
DEPOSITION SERVICES	
Transcript of Regular Hearing	\$ 323.40
TODD REPORTING	
Deposition of Jerry D. Hardin	\$ 336.35
IRELAND & BARBER	
Transcript of Preliminary Hearing,	

LESLIE M. JUMP

7

DOCKET NO. 154,492

Dated May 21, 1991

\$ 186.65

BARBER & ASSOCIATES

Transcript of Preliminary Hearing,
Dated January 14, 1993

\$ 109.50

Deposition of Ernest R. Schlachter, M.D.

\$ 212.80

IRELAND COURT REPORTING

Deposition of Tyrone Artz, M.D.

\$ 215.16

IT IS SO ORDERED.

Dated this _____ day of February, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Steven R. Wilson, 1861 North Rock Road, Suite 320, Wichita, Kansas 67206
Frederick L. Haag, 700 Fourth Financial Center, Wichita, Kansas 67202
James R. Roth, P.O. Box 127, Wichita, Kansas 67201-0127
William F. Morrissey, Assistant Director
George Gomez, Director